UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SUSAN DANCY-BUTLER, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER AT-0752-98-0276-I-1 DATE: DEC 11 1998

Max L. Ostrow, Esquire, Weissman & Ostrow, Memphis, Tennessee, for the appellant.

Sheri L. Smith, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant timely petitions for review of a February 23, 1998 initial decision that dismissed her appeal for lack of jurisdiction. For the reasons discussed below, we DENY the petition for review, REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and DISMISS the appeal as untimely filed.

BACKGROUND

¶2 According to the appellant, the agency's Internal Revenue Service hired her in September, 1983, and it assigned her to work during the night shift in late 1994.

Initial Appeal File (IAF), Tab 6 at 1. The appellant alleged that she was diagnosed with hypertension and severe headaches in mid-1995, and that she could receive treatment for these conditions only from 5:30 a.m. to 9:00 a.m. *Id*. The appellant requested a transfer to the day shift, but on September 8, 1995, the agency denied this request. IAF, Tab 8, Subtab 4S. According to her petition for review, the appellant attempted to work on the night shift until December, 1995, when she was physically unable to withstand it. Petition for Review (PFR) File, Tab 1 at 2. A memorandum submitted by the agency confirmed that the appellant stopped reporting for work in December, 1995. IAF, Tab 8, Subtab 4C. While the appellant was absent, she continued to submit medical documentation to support her request for a transfer, including a January 4, 1996 letter from her doctor describing her condition and requesting a shift change. IAF, Tab 8, Subtab 4P. On March 21 and April 26, 1996, the agency denied the appellant's subsequent requests for reassignment to the day shift. IAF, Tab 8, Subtabs 4K, 4M. On June 25, 1996, the agency granted the appellant's request for a leave of absence through January 4, 1997, with a starting date retroactive to January 7, 1996. IAF, Tab 8, Subtabs 4I, 4J. However, the appellant did not return to work in January, 1997, and by April, 1997, she had retained the services of an attorney to represent her in requesting her reinstatement and back pay. IAF, Tab 5, Exhibit A. On May 1, 1997, the agency provided the appellant with Internal Revenue Service Form 10060, Request for Reasonable Accommodation. IAF, Tab 8, Subtabs 4B, 4E. Upon the appellant's submission of the completed form, accompanied by a letter from her doctor identical to the letter he provided on January 4, 1996, the agency reassigned the appellant to the day shift, and she reported for work on June 23, 1997. IAF, Tab 1 at 11.

¶3 On December 23, 1997, the appellant filed an appeal with the Board's Atlanta Regional Office alleging that the agency failed to reasonably accommodate her medical condition when it did not reinstate her as of January 7, 1996. IAF, Tab 1

at 9. The AJ issued an order requiring the appellant to file evidence and argument on the issues of timeliness and jurisdiction. IAF, Tab 4. In response to this order, the appellant alleged that the Board had jurisdiction over the appeal because the agency constructively suspended the appellant for a period of more than 14 days when it denied her requests for a transfer to the day shift in light of her medical condition. IAF, Tab 6 at 3. Both parties also filed responses on the timeliness issue. IAF, Tabs 5, 9. Because the administrative judge concluded that there were no factual disputes bearing on the issue of jurisdiction, he dismissed the appeal for lack of jurisdiction without conducting a hearing. IAF, Tab 10, Initial Decision (ID) at 1. The administrative judge found that the appellant never alleged that she was fully able to work her assigned shift, nor that she was willing to report for work on her assigned shift, and he therefore concluded that the appellant failed to allege facts that would establish, if true, that the agency initiated her placement on leave. ID at 3. He further found that the appellant failed to allege facts sufficient to establish that her inability constituted a disability entitling her to accommodation under the Rehabilitation Act. *Id*. Because he dismissed the appeal for lack of jurisdiction, the administrative judge did not decide the timeliness issue. ID at 1. The appellant filed a timely petition for review alleging that the administrative judge erred in determining that the agency did not place the appellant on leave. PFR File, Tab 1 at 2. The appellant also alleged that she was entitled to a hearing because her allegations were sufficient to establish a prima facie case of discrimination under the Rehabilitation Act. *Id*. at 3.

ANALYSIS

Timeliness

¶4 If an employee who initiated his own absence requests to return to work within certain medical restrictions, and if the agency is bound by the Rehabilitation Act to accommodate the medical condition and to allow the employee to return, the

agency's failure to reasonably accommodate the employee becomes a constructive suspension. *See Schultz v. U.S. Postal Service*, MSPB Docket No. PH-0752-94-0233-B-1, slip op. at 3-5 (Apr. 21, 1998). Such a suspension is appealable to the Board once it extends for more than 14 days. 5 U.S.C. §§ 7512(2), 7513(d). When the agency does not make an express decision to suspend an employee for more than 14 days, the time in which the appellant may file a timely appeal begins to run when the appellant has been absent for more than 14 days. *Greek v. U.S. Postal Service*, MSPB Docket No. DE-0752-97-0555-I-1, slip op. at 4 (June 9, 1998). According to the appellant, her constructive suspension began when the agency failed to reasonably accommodate her medical restrictions on January 7, 1996. IAF, Tab 1 at 9. Thus, according to the appellant's version of the events, the filing period began to run on January 21, 1996. At the time, Board regulations stated that appellants who file appeals raising issues of prohibited discrimination "may either file a timely complaint of discrimination with the agency or file an appeal with the Board within 30 days after the effective date of the agency action being appealed." 5 C.F.R. § 1201.154 (1997).[1] The record indicates that the appellant did not file a complaint of discrimination with the agency. IAF, Tab 8, Subtab 3. Therefore, in order to be timely, the appellant would have had to submit her appeal to the regional office by February 20, 1996. Because the appellant did not submit her appeal until December 23, 1997, the administrative judge properly issued an order that provided the appellant an opportunity to show good cause why her appeal should not be dismissed as untimely. IAF, Tab 4 at 2; *see* 5 C.F.R. § 1201.22(c). Although the administrative judge did not decide the timeliness issue, both parties filed responses to the administrative judge's order on timeliness

[1] This regulation has been amended and now provides that appellants may file their appeals directly with the Board "no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision on the appealable action, whichever is later." 5 C.F.R. § 1201.154(a).

and jurisdictional issues. IAF, Tabs 5, 6, 9. Because the record is fully developed on the issue of timeliness, we will decide this issue without remanding the appeal to the regional office. *See Chudson v. Environmental Protection Agency*, 71 M.S.P.R. 115, 118 (1996), *aff'd*, 132 F.3d 54 (Fed. Cir. 1997).

¶5 To establish good cause for the untimely filing of an appeal, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). The appellant has the burden of proof, by a preponderance of the evidence, with respect to the timeliness of the appeal. 5 C.F.R. § 1201.56(a)(2)(ii). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition. *Moorman v. Department of the Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶6 Evidence in the record demonstrated that the appellant's attorney was aware of the basis for the appellant's appeal on April 16, 1997. On that date, he sent a letter to the agency in which he stated that the agency should have reasonably accommodated the appellant by reassigning her to the day shift, and he also requested back pay from January 7, 1996. IAF, Tab 8, Subtab 4F. When the appellant filed her appeal in late December, 1997, more than 23 months had elapsed since the agency denied the appellant's request to return to work within certain medical restrictions, and more than 8 months had elapsed since the appellant's attorney articulated the basis for the appellant's appeal. In response to the administrative judge's timeliness order, the appellant's attorney alleged that the agency disregarded his representation of the appellant, thereby directly

causing the delay in filing the appeal. IAF, Tab 5 at 1. Even if we were to accept this allegation as true, the appellant's attorney failed to explain how the agency's disregard caused the delay. Although he claimed that neither the agency nor the appellant informed him that the agency had reinstated the appellant until sometime after the fact, *id*., because the agency reinstated the appellant more than 14 days after it denied her original request to return to work within certain medical restrictions, the appellant's subsequent reinstatement did not affect the Board's jurisdiction or the appellant's right to file an appeal over her constructive suspension claim. *See Miller v. U.S. Postal Service*, MSPB Docket No. CH-3443-97-0472-I-1, slip op. at 3 (Jun. 1, 1998). Furthermore, even if the attorney intended to wait to determine how the agency would respond to his letter before advising the appellant to file an appeal with the Board, a decision to deal directly with the agency rather than to file an appeal with the Board does not demonstrate good cause for the delay. *See Fredrick v. Department of Justice*, 76 M.S.P.R. 477, 480 (1997); *Singleton v. U.S. Postal Service*, 70 M.S.P.R. 339, 343 (1996) (an attempt to resolve an adverse action outside of an appeal to the Board does not excuse a late filing).

¶7 The appellant's attorney also alleged that the agency committed harmful error by not advising the appellant of her appeal rights.[2] IAF, Tab 5 at 2. Assuming that the appellant was entitled to notice of her appeal rights,[3] the appellant failed

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[2] In his response to the administrative judge's order, the appellant's attorney referred to the appellant's "right to appeal the Agency's action of reinstatement." IAF, Tab 5 at 2. Because reinstatement is not an adverse action described in 5 U.S.C. § 7512 over which the Board has jurisdiction pursuant to 5 U.S.C. § 7513(d), we assume that the appellant was referring to the appellant's right to appeal her constructive suspension, not her reinstatement.

[3] An employee is not entitled to notice of her appeal rights from a presumably voluntary employee-initiated action until she puts the agency on notice that she considers the action to be involuntary, or the circumstances show that the agency knew or should have known facts indicating that the action was involuntary. *See Jones v. U.S. Postal Service*, 66 M.S.P.R. 594, 597 (1994). In this case, the appellant never informed the agency that she considered her

to establish that she otherwise "acted promptly and within allowable time limits once [s]he was aware of the basis of [her] claim." *Gordy v. Merit Systems Protection Board*, 736 F.2d 1505, 1508 (Fed. Cir. 1984). Although the appellant's attorney responded to the administrative judge's timeliness order by asserting that "[i]t took us until the latter part of 1997 to realize what the Agency had done and to articulate a position for [the appellant]," IAF, Tab 5 at 2, this assertion is inconsistent with his April 16, 1997 letter to the agency in which he articulated the basis for the appellant's appeal. An appellant who is not advised of her appeal rights must still demonstrate that she exercised due diligence in discovering and pursuing her appeal rights. *See Martin v. U.S. Postal Service*, 70 M.S.P.R. 611, 616 (1996); *Krizman v. U.S. Postal Service*, 66 M.S.P.R. 233, 239-40 (1995), *aff'd*, 77 F.3d 434 (Fed. Cir. 1996); *Farrell v. Department of Justice*, 50 M.S.P.R. 504, 509 (1991) (the appellant did not establish good cause when he neglected to attempt to discover possible avenues of relief), *overruled in part on other grounds by Leach v. Department of Commerce*, 61 M.S.P.R. 8 (1994). Even if we would have been inclined to excuse the appellant's delay while she was proceeding pro se, she has not shown good cause for the 8 month delay between the date when her attorney was aware of the basis for her appeal and the date on which she filed her appeal. *See Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981) (the appellant is responsible for the errors of her chosen

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absence involuntary. In his letter of April 16, 1997, the appellant's attorney alleged that the agency involuntarily transferred the appellant to the night shift, but he did not allege that the agency initiated her placement on leave. IAF, Tab 5, Exhibit A. In addition, an agency's failure to notify an employee of her appeal rights may be insufficient to establish good cause for the delay in filing an appeal if the right to appeal the action was not made clear until after the challenged employment action was taken. *See Clark v. U.S. Postal Service*, 989 F.2d 1164, 1168 (1993). The Board did not issue the decision in *Schultz v. U.S. Postal Service*, MSPB Docket No. PH-0752-94-0233-B-1 (Apr. 21, 1998), the case that established that the agency's denial of reasonable accommodation could result in a constructive suspension, until after the appellant filed her appeal. Thus, it is not clear that the agency was obligated to provide the appellant with notice of her appeal rights prior to the time she filed her appeal.

representative). In light of the length of the delay, the appellant's failure to adequately explain the delay between April 16, 1997 and December 23, 1997, and the appellant's failure to exercise due diligence to discover and pursue her appeal rights, we find that the appellant has not shown good cause for the delay. Accordingly, we dismiss this appeal as untimely filed. 5 C.F.R. § 1201.22(c).

¶8 Because our timeliness determination does not require us to determine whether the agency took an appealable action, we find that the issues of timeliness and jurisdiction in this case are not "inextricably intertwined." *See Romine v. U.S. Postal Service*, 64 M.S.P.R. 68, 72 (1994). Therefore, because we need not decide the jurisdictional issue, we vacate the initial decision. *See Martin*, 70 M.S.P.R. at 615 ("Only where jurisdiction and timeliness are "inextricably intertwined" must a finding be made on the former before an appeal may be dismissed as untimely."); *Popham v. U.S. Postal Service*, 50 M.S.P.R. 193, 197-98 (1991) (if the record is sufficiently developed on the issue of timeliness, it may be appropriate to assume that the appeal is within the Board's jurisdiction and to dismiss the appeal on timeliness).

ORDER

¶9 This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit

717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: _____
Robert E. Taylor
Clerk of the Board

Washington, D.C.